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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re TONY K., a Person Coming Under
the Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY K.,

Defendant and Appellant.

A124250

**(Lake County
Super. Ct. No. CR916521)**

Tony K. appeals from a judgment entered after he pleaded no contest to resisting an officer (Pen. Code, § 69) and misdemeanor battery. (Pen. Code, §242.) He contends (1) the trial court erred when it failed to obtain and consider the appropriate report prior to sentencing, (2) the court failed to consider his needs prior to sentencing, and (3) the court erred when it imposed a \$30 fine. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2008, appellant, who was then 16-years-old and incarcerated in Lake County Juvenile Hall, punched another ward. When a correctional officer tried to restrain appellant, the officer fell to the ground and broke her arm. The other ward suffered a swollen eye and bloody nose.

Based on these facts, a petition was filed alleging appellant came within the jurisdiction of the juvenile court. The juvenile court ruled appellant was not fit for juvenile court jurisdiction (Welf. & Inst. Code, §707¹) and transferred his case to adult court. In adult court, appellant pleaded no contest to the two offenses we have set forth above.

A probation report prepared prior to sentencing recommended that the court order a Penal Code section 1203.03 evaluation.² Subsequently, the probation department recommended that a diagnostic study pursuant to section 707.2³ be prepared because the minor “is 16 years old.” On October 27, 2008, the court ordered a section 707.2 diagnostic study. However on November 12, 2008, Division of Juvenile Justice (DJJ), advised the court by letter that appellant was not eligible for a section 707.2 study. The DJJ urged the court to order a Penal Code section 1203.03 evaluation instead.

¹ Unless otherwise indicated, all further section references will be to the Welfare and Institutions Code.

² Penal Code section 1203.03, subdivision (a) provides: “In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period.”

³ As is relevant, section 707.2, subdivision (a) states, “Prior to sentence and after considering a recommendation on the issue which shall be made by the probation department, the court of criminal jurisdiction may remand the minor to the custody of the Department of the Youth Authority for a period not to exceed 90 days for the purpose of evaluation and report concerning his or her amenability to training and treatment offered by the Department of the Youth Authority. If the court decides not to remand the minor to the custody of the Department of the Youth Authority, the court shall make a finding on the record that the amenability evaluation is not necessary.”

In 2005, “[t]he Department of the Youth Authority was abolished . . . and replaced by the Division of Juvenile Justice within the Department of Corrections and Rehabilitation.” (3 Witkin, Cal. Crim. Law (3d ed., 2009 Supp.) Punishment, § 77 p. 36.)

~()~ On November 24, 2008, the court remanded appellant to the Division of Adult Institutions for a Section 1203.03 evaluation.

The court received the Section 1203.03 evaluation in January 2009. It included some disturbing information. According to the evaluation, appellant admitted he would “continue to commit new crimes because he [would] continue to ‘hang out with [his] homeys.’” The counselor who prepared the report recommended that appellant be incarcerated because he (1) “did not appear to be remorseful . . . towards the juvenile he assaulted” and did “not accept responsibility” for the injuries to the correctional officer ; (2) was “a risk to society due to his violent, immature, and complete[ly] disrespectful nature” ; (3) had “a serious substance abuse problem” ; (4) lacked motivation to improve himself ; and (4) associated with gangs. According to the counselor, appellant’s “lack of self motivation, immaturity, continued violent behavior and gang association, make it almost impossible to believe [he] will successfully complete any probation program.”

A psychologist who evaluated appellant as part of the Penal Code section 1203.03 report reached a different conclusion. He recommended probation noting that appellant was “highly motivated” and expressed remorse about committing the crime. The psychologist opined that sending appellant to prison “would do more harm than good . . .” The psychologist conceded that appellant posed a “moderate risk” to the community if he should be granted probation. However the psychologist considered that risk to be minor and said that it was in the community’s best interest to give the minor “one more chance on probation.”

An Associate Warden concurred with the correctional counselor. He recommended incarceration because appellant was a “a poor candidate for probation and a risk to society.”

A supplemental probation report filed in March 2009 contained further troubling information. It stated that appellant had suffered thirty seven “behavioral restrictions” following his return to juvenile hall. Of those, fifteen were violations for failing to

follow facility rules, nineteen were for being disrespectful or disruptive, two were for damaging facility property and one was for possessing contraband. In one incident, the minor “incited a two hour riot.” The probation department recommended sentencing the appellant to state prison for two years.

At a sentencing hearing in March 2009, the court indicated it had read the probation officer’s initial and supplemental probation reports as well as the section 1203.03 evaluation. The court also stated it had reviewed a letter written by appellant’s second cousin who stated she and her husband were willing to share their home with appellant.

After hearing argument from counsel, the court sentenced appellant to two years in prison explaining that appellant had demonstrated he could not “follow rules or regulations,” and “could not successfully complete probation.”

This appeal followed.

While this appeal was pending, appellant was transferred to DJJ where he is now housed and receiving treatment.

II. DISCUSSION⁴

A. *Whether the Court Considered the Proper Report*

As we have noted, before sentencing appellant, the court ordered that a diagnostic study pursuant to section 707.2 be prepared. That section states that a court of criminal jurisdiction may remand a minor to the custody of the DJJ for a period not to exceed 90 days for the purpose of evaluation and report concerning his amenability to training and treatment offered by the DJJ. However the DJJ sent a letter to the court stating that appellant was not eligible for section 707.2 report. The DJJ did not cite any statute or

⁴ On July 24, 2009, while this case was being briefed, appellant filed a request that asked us to take judicial notice of the legislative history of some of the statutes that are at issue in this case. We deferred ruling on the request until the merits of the case. Having now considered appellant’s request, we grant it.

case to support its position. It simply stated that appellant was not eligible because he was “already 16 years of age when he committed these non-eligible offenses.” The DJJ told the court it could order a diagnostic evaluation under Penal Code section 1203.03 instead. The trial court accepted the DJJ’s recommendation and ordered an evaluation under section 1203.03.

Appellant now contends the DJJ erred when it told the court he was not eligible for a section 707.2 report. According to appellant, he was eligible for *housing* at the DJJ under section 1731.5, subdivision (c)⁵ and because he was eligible for housing, a report under section 707.2 should have been prepared. Appellant maintains the judgment committing him to state prison must be reversed because the trial court did not consider the correct report and therefore misunderstood the scope of its sentencing discretion.

The People do not dispute that the DJJ erred when it told the court that appellant was not eligible for a section 707.2 report. Furthermore, the People concede that appellant was eligible for housing at the DJJ under section 1731.5, subdivision (c). However, the People argue the issue is moot because appellant *currently* is being housed and treated at the DJJ. We agree with the People.

The purpose of a section 707.2 report to determine a minor’s “amenability to training and treatment offered by the . . . [DJJ]” (§ 707.2, subd. (a),) and here as appellant concedes, he is already being housed and treated at the DJJ. It would be pointless for this court to reverse the judgment and to remand for the preparation of a report to determine whether appellant is amendable to treatment at the DJJ when appellant is already being

⁵ Section 1731.5, subdivision (c) states in part: “Any person under 18 years of age who is not committed to the division pursuant to this section may be transferred to the authority by the Secretary of the Department of Corrections and Rehabilitation with the approval of the Chief Deputy Secretary for the Division of Juvenile Justice. In sentencing a person under 18 years of age, the court may order that the person shall be transferred to the custody of the Division of Juvenile Facilities pursuant to this subdivision. . . . The transfer shall be solely for the purposes of housing the inmate”

housed and treated at the DJJ. Because our ruling on this point could have no practical impact, the issue is moot. (*People v. Travis* (2006) 139 Cal.App.4th 1271, 1280.)

Appellant contends the issue is not moot because courts use section 707.2 reports for a variety of sentencing decisions. (See e.g. *People v. Rangel* (1999) 70 Cal.App.4th 350, 355.) Appellant argues that remanding his case for a new section 707.2 report would allow the court to reconsider all its sentencing options including the imposition of the low term and probation. However, this argument is premised on the assumption that the trial court did not have sufficient information to allow it to determine what term was appropriate and whether appellant should be placed on probation. That is incorrect. The original and supplemental probation reports both discussed what term was appropriate and whether appellant should be placed on probation. Furthermore, the section 1203.03 diagnostic evaluation and associated psychologist's report both discussed the issue of probation extensively. While those reports were not precisely equivalent to a section 707.2 report because they were not prepared by persons with special expertise in dealing with juvenile offenders, we believe they were sufficiently close that they were adequate to advise the court as to the scope of its sentencing discretion and whether appellant should be granted probation. With respect to this issue, any error that may have been committed was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Indeed, given appellant's frank admission that he would continue to commit crimes if he was released and his abysmal conduct while awaiting sentencing, a grant of probation was not a realistic possibility.

We conclude the judgment need not be reversed because the trial court considered the wrong report.⁶

⁶ Having reached this conclusion, we need not decide whether appellant forfeited the right to raise this issue because he failed to object in the court below.

B. *Whether the Court Considered Appellant's Needs*

As we have noted, section 707.2 states that a trial court has the discretion to order that a report be prepared to determine whether a minor would benefit from being placed with the DJJ. That section also sets forth the factors a court should consider when deciding what disposition is appropriate. Specifically, section 707.2, subdivision (a) states, “The need to protect society, the nature and seriousness of the offense, the interests of justice, *and the needs of the minor* shall be the primary considerations in the court’s determination of the appropriate disposition for the minor.” (Italics added.)

Appellant now contends his judgment must be reversed because the trial court did not adequately consider his needs prior to sentencing.

To the extent the court’s failure to obtain a section 707.2 report prevented the court from considering whether appellant’s needs would be best served by housing him in the DJJ, those needs are already being addressed because he is being housed and treated at the DJJ. This aspect of appellant’s argument is moot. (*People v. Travis, supra*, 139 Cal.App.4th at p. 1280.)

As for considering appellant’s needs when determining what sentence was appropriate or whether to place appellant on probation, both reports that were submitted to the court addressed those issues. The original and supplemental probation reports both discussed what disposition was appropriate given appellant’s background and history. The section 1203.03 report and associated psychological evaluation addressed appellant’s needs extensively.⁷ Again, while the reports that were submitted were not precisely

⁷ For example, the psychological evaluations discussed appellant’s situation as follows: “This individual does not appear to have ever experienced a stable home environment. He is highly motivated to make better choices and finish his education. A stable residence with his sister, a substance abuse program and/or therapy for both his anger and substance abuse (they are related) would be necessary conditions of probation. I have administered many of these evaluations over the years and this is the most highly motivated minor I have interviewed. I believe his depression is situational, however he needs help from a therapist to learn to deal with the abuse from his past and the

equivalent to a section 707.2 report because they were not prepared by persons with special expertise in dealing with juvenile offenders, we believe they were sufficiently similar to adequately advise the court that appellant's needs must be considered when determining what disposition was appropriate and to inform the court of those needs.

We conclude the judgment need not be reversed on this ground.

C. Validity of the \$30 Fine

At the conclusion of sentencing, the trial court ordered appellant to pay a \$30 "conviction assessment." Appellant now challenges that fine on two grounds.

First, appellant contends the fine was "apparently" imposed under the authority of Government Code section 70373⁸ a section that recently was added effective January 1, 2009. (Stats. 2008, ch. 311, § 6.5.) Appellant argues that imposing a fine under that section would be invalid absent a clear indication that the Legislature intended the section to apply retroactively. We reject this argument on procedural grounds. The trial court *did not* state that it imposed the fine under the authority of Government Code section 70373. We cannot and will not presume the trial court erred. (See, e.g., *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.)

Alternately, appellant contends the \$30 fine was invalid under ex post facto principles. This argument is premised on the assumption that the fine was imposed under the authority of Government Code section 70373. We cannot presume that to be the case. (*People v. Martinez, supra*, 65 Cal.App.4th at p. 1517.) Furthermore, even if we were to assume, arguendo that the court imposed the fine under Government Code section 70373,

relationship between his anger & substance abuse. I do believe it is the best interest of both the community and the individual to be given one more chance on probation. I do not believe prison is an appropriate setting for him at this time. In fact I believe prison would do more harm than good at this time in his life."

⁸ Government Code section 70373, subdivision (a)(1) states in part, "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony"

we would find no error on this ground. Appellant's ex post facto argument was addressed and rejected in *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, pages 3-7. We believe that case was decided correctly.

III. DISPOSITION

The judgment is affirmed.

JONES, P.J.

We concur.

SIMONS, J.

BRUINIERS, J.